

No. 22503

IN THE

United States Court of Appeals

for the Ninth Circuit

EDGAR P. GAUTREAUX, etc. et al.,
Appellants,

VS.

KATHERINE KUMM and MARY J. SWEENEY,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA.
HON. A. ANDREW HAUKE, JUDGE.

APPELLEES' REPLY BRIEF

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vs.

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Appellees.

APPELLEES' REPLY BRIEF

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court, Central Division of California, in an action in interpleader, entered September 12, 1967, ordering distribution of certain funds deposited into the registry of the court by the plaintiff in interpleader.

The District Court had jurisdiction under the Interpleader Act, 28 U.S.C. Sec. 1335(a). This Court has jurisdiction under the provisions of 28 U.S.C. Sec. 1291 on the appeal from a final judgment.

STATEMENT OF THE CASE

A. Statement of the Pleadings

Plaintiff, Travelers Indemnity Company, filed an action in Interpleader under an insurance policy naming Mary J. Sweeney as an insured and covering the automobile in which appellee Katherine Kumm was riding. The policy limits were \$20,000 for public liability and \$5,000.00 for property damage, a total of \$25,000.00, which was paid into the registry of the Court by plaintiff. Answers were filed by claimants to the property damage portion of the policy and by appellants and appellees to the public liability portion. Plaintiff received a summary judgment and was dismissed from the case, and the property damage claimants settled their claims by stipulated judgment, leaving only appellants and appellees as litigants in the within action.

Appellees, Mary J. Sweeney and Katherine Kumm, filed an answer and cross-complaint naming appellants and cross-defendant Bettie J. Brown, as Special Administratrix of the Estate of Ann Margaret Baumbach, deceased, alleging a cause of action against Bettie J. Brown, as Special Administratrix of the Estate of Ann Margaret Baumbach, deceased, who was the driver of the automobile in which Katherine Kumm was riding, for personal injuries sustained by Katherine Kumm as a result of the negligence of Ann Margaret Baumbach, and a cause of action for the wrongful death of Elva Baumbach, the mother of appellees Katherine Kumm and Mary J. Sweeney. (Clk. Tr. pp. 2-14)

Appellants Edgar P. Gautreaux, individually, and as Executor of the Estate of Agnes Leonard Gautreaux, deceased, and Shirley Gautreaux and Eloise Gautreaux, children of Edgar P. Gautreaux and Agnes Leonard Gautreaux, filed an answer and cross-complaint against Bettie J. Brown, as Special Administratrix of the Estate of Ann Margaret Baumbach, deceased, and against appellees for personal injuries sustained by Edgar P. Gautreaux, Shirley Gautreaux and Eloise Gautreaux, and for the wrongful death of Agnes Leonard Gautreaux. (Clk. Tr. pp. 15-21)

Answers were filed to the cross-complaints by appellees and Bettie J. Brown as Special Administratrix of the Estate of Ann Margaret Baumbach, deceased, (Clk. Tr. pp. 22-28) but no answer was filed to the cross-complaint of appellees by appellants.

In their cross-complaint, appellees allege that they have filed a creditor's claim against the Estate of Ann Margaret Baumbach, deceased, and that Bettie J. Brown as Special Administratrix with general powers has rejected the claim against the estate before the filing of the cross-complaint. (Clk. Tr. pp. 8-9 [Par. III of the cross-complaint].)

No allegation of the filing of a creditor's claim against the estate of Ann Margaret Baumbach, deceased, is contained in the cross-complaint of appellants. (Clk. Tr. pp. 16-21)

A pretrial conference was held and a pretrial conference order made reciting that the sum of \$19,276.21 remains in the registry of the court and permitting

the withdrawal of the monies to be deposited in several federal savings and loan associations pending the disposition of this action and suspending all further proceedings in the United States District Court, until appellants and appellees have liquidated their respective claims by final judgment in the actions then pending in the courts of the State of California and New Mexico and dismissing the various cross-complaints. (Clk. Tr. pp. 84-87)

Appellants filed as an exhibit a judgment from the District Court of the State of New Mexico against Kathryn A. Kumm and *Mary J. Sweeney, Administratrix of the Estate of Ann Margaret Baumbach, deceased*, reciting that the "defendant Mary J. Sweeney is the administratrix of the Estate of Ann Margaret Baumbach, duly appointed for such purpose by the Probate Court in the State of California," and that the defendants were served by complying with the terms of the New Mexico Non-Resident Motorists Statute and have defaulted, rendering a default judgment as prayed in the complaint for \$100,000.00 for Edgar P. Gautreaux as administrator of the Estate of Agnes Gautreaux, deceased, for \$5,000.00 in favor of Edgar P. Gautreaux, individually, for \$10,000.00 for Shirley Gautreaux and for \$10,000.00 for Eloise Gautreaux. (Clk. Tr. pp. 97-100)

Appellees filed a "Motion for Disposition of Funds on Deposit," praying that the Court "distribute the funds on deposit among the persons entitled thereto, based upon the judgments on file herein, after a hearing for the purpose of equitably distributing the funds which are insufficient to pay both judg-

ments in full," attaching as an exhibit a certified copy of a judgment received in the Superior Court of the State of California for the County of Los Angeles, after a court trial, against the defendant Bettie J. Brown as Special Administratrix of the Estate of Ann Margaret Baumbach, deceased, in favor of plaintiff Katherine Kumm in the sum of \$25,000.00 for personal injuries and in favor of Katherine Kumm and Mary J. Sweeney in the sum of \$10,000.00 for the wrongful death of their mother, Elva Baumbach. By a separate provision, execution was limited to the funds on deposit in the United States District Court in this action.

An affidavit accompanying the motion recites that with respect to plaintiff Katherine Kumm the "judgment was obtained to compensate said plaintiff for personal injuries including a plurality of fractured ribs, a fractured pelvis, multiple internal injuries, severe cuts and lacerations on her face, hands and legs, multiple bruises and contusions to various parts of her body, and including medical expenses and loss of wages as a sales clerk from July 15, 1964, to October 24, 1964, in the total sum of \$4,382.70, actual losses sustained by way of special damages, and that as to plaintiffs Katherine Kumm and Mary J. Sweeney for the loss of their mother in the wrongful death cause of action, the judgment includes "the sum of \$1,909.52 for actual burial and funeral expenses paid by said plaintiffs." (Clk. Tr. pp. 101-106)

Appellants filed a "List of Exhibits to be offered by defendants Gautreaux," including a list of special damages sustained by appellants as follows: Charles

W. Kenny, M.D. for Edgar P. Gautreaux \$181.20, for Shirley Gautreaux \$161.20, for Eloise Gautreaux \$176.80; Rollie Mortuary Bill \$582.36; Bill of F. W. Parker, M.C. for Agnes L. Gautreaux \$125.00; Bill of John W. Martin, M.C. for Agnes L. Gautreaux \$78.00; Transportation expense for casket and funeral, Chauvin Funeral Home \$440.00; 4 Ticket stubs for transportation of casket \$90.89; Ray J. Chassiva, Tombs \$422.20; St. Mary Hospital Bill for Edgar P. Gautreaux \$147.20, for Agnes L. Gautreaux \$240.59, for Shirley Gautreaux \$241.45, for Eloise Gautreaux \$194.65; Ticket stubs for transportation of Edgar P. Gautreaux and daughters from Gallup, New Mexico to Houma, Louisiana, A.T. & S.F. Ry. \$128.50 and So. Pacific Ry. \$7.00. (Clk. Tr. pp. 69-70)

Appellees set forth their special damages in the "Memorandum of Contentions of Fact and Law Filed on Behalf of Defendants Katherine Kumm and Mary J. Sweeney," as follows: "Katherine Kumm claims the following special damages, to wit: St. Mary's Hospital, Gallup, New Mexico \$316.00; two ambulance trips, Gallup, New Mexico \$75.00; St. Mary's Hospital, Long Beach \$1,447.20; Ambulance, Los Angeles to Long Beach \$75.00; Dr. Arthur Beland \$650.00; Dr. E. Wiater \$230.00; Dr. K. V. Johnson \$115.50; Dr. Ross Delinger, (not discharged) \$220.00; Medicine \$35.00; Loss of wages from July 15, 1964 to October 20, 1964 as sales clerk at \$375.00 per month \$1,219.00; Total specials of Katherine Kumm \$4,382.70. Burial and funeral expenses of Elva Baumbach, deceased \$1,909.52." (Clk. Tr. p. 79)

In its Findings of Fact, the Court found that the defendants were involved in an automobile accident as a result of which Agnes Leonard Gautreaux, Ann Margaret Baumbach and Elva Baumbach were killed, and Edgar P. Gautreaux, Shirley Gautreaux, Eloise Gautreaux and Katherine Kumm were injured.

The Court further found that the death of Elva Baumbach, deceased, mother of Katherine Kumm and Mary J. Sweeney, and the personal injuries of Katherine Kumm resulted in special damages to Katherine Kumm for medical expenses and loss of wages of of \$4,382.70, and of Katherine Kumm and Mary J. Sweeney for burial expenses and funeral expenses of \$1,909.52.

The Court further found that the special damages sustained by Edgar P. Gautreaux for medical expenses were in the sum of \$328.40, for Shirley Gautreaux, a minor, in the sum of \$402.65, and for Eloise Gautreaux, a minor, in the sum of \$371.45, and that the funeral and burial expenses of Edgar P. Gautreaux by reason of the death of Agnes Leonard Gautreaux were in the sum of \$2,388.15.

The Court further found that the sum remaining on deposit and subject to distribution in the amount of \$19,276.21 and interest accumulated since the date of deposit is insufficient to pay the judgments in full. (Clk. Tr. pp. 111-113)

No objection is made on this appeal to these findings.

As Conclusions of Law, the Court concluded that each of the defendants is entitled to distribution out

of the funds on hand to the return of all special damages found and that the balance of funds remaining on deposit, after deduction of the amounts of special damages, should be distributed as follows:

One-third of the balance shall be payable to Katherine Kumm as general damages for personal injuries sustained by her.

One-third shall be payable to defendants Gautreaux for personal injuries in the following proportions:

One-fifth to Edgar P. Gautreaux;

Two-fifths to Shirley Gautreaux, a minor;

Two-fifths to Eloise Gautreaux, a minor;

One-third is payable as follows:

One-half to Katherine Kumm and Mary J. Sweeney for the wrongful death of Elva Baumbach, deceased;

One-half to Edgar P. Gautreaux as Executor of the Estate of Agnes Leonard Gautreaux, deceased.

The Court then proceeded to specify the particular amounts payable to the parties as follows:

To Katherine Kumm the sum of \$9,293.02;

To Mary J. Sweeney, the sum of \$1,745.87;

To Edgar P. Gautreaux, the sum of \$4,931.66, being the sum of \$3,349.44 to him individually and the sum of \$1,582.22 to him as executor of the estate of Agnes Leonard Gautreaux, deceased.

To Edgar P. Gautreaux, as guardian ad litem of Shirley Gautreaux, a minor, the sum of \$1,668.43;

To Edgar P. Gautreaux, as guardian ad litem of Eloise Gautreaux, a minor, the sum of \$1,637.23.

Interest accumulated in the savings and loan accounts was ordered to be divided in the same proportions as the principal amount. (Clk. Tr. pp. 114-115)

Judgment was entered accordingly. (Clk. Tr. pp. 116-118)

B. Statement of Facts

As described in the "Memorandum of Contentions of Fact and Law Filed on Behalf of Defendants Katherine Kumm and Mary J. Sweeney," this case arises out of an automobile accident on U. S. Highway 66 about four and one-half miles west of Gallup in McKinley County, New Mexico, at about 5:00 p.m. on Wednesday, July 15, 1964. A 1963 Falcon 2 door automobile driven by Ann Margaret Baumbach and having as its passengers Katherine Kumm, owner of the automobile and sister-in-law of the driver, and the mother of Katherine Kumm, Elva Baumbach, was westbound on Highway 66.

The road was a two lane paved highway with a shoulder on either side of the paved portion and at the point of collision it was straight and level running east and west. It was raining. The automobile driven by Ann Margaret Baumbach, while traveling west on Highway 66, hit a slick patch on the highway and skidded into the eastbound traffic lane, glancing off a 1961 Rambler 4 door automobile being driven by Angelina De Antonio Beutner.

Due to the glancing blow the 1963 Falcon two door automobile turned over on its side and was lying on its side when it was struck by a 1964 Pontiac auto-

mobile eastbound on U. S. Highway No. 66 and being driven by Edgar P. Gautreaux. As a result of the accident Ann Margaret Baumbach, the driver of the 1963 Falcon 2 door automobile, Elva Baumbach, a passenger therein, and Agnes Gautreaux, a passenger in the 1964 Pontiac automobile, were killed. Katherine Kumm sustained injuries including fractured ribs, a fractured pelvis, fractured spleen, multiple internal injuries, severe cuts and lacerations on her face, hands and legs, multiple bruises and contusions to various parts of her body and traumatic shock.

In a second cause of action Katherine Kumm and Mary J. Sweeney claim damages for wrongful death of their mother, Elva Baumbach against the estate of Ann Margaret Baumbach, deceased.

Before July 15, 1964, and before engaging upon this automobile trip, Katherine Kumm, Ann Margaret Baumbach, deceased, sister-in-law of Katherine Kumm, and Elva Baumbach, mother of Katherine Kumm and Mary J. Sweeney, entered into a joint venture agreement whereby said three parties agreed to pool their expenses for the purpose of engaging on this trip, and Katherine Kumm agreed to furnish her automobile for the trip as part of her consideration for the making of the trip, the agreement providing that from such pool all expenses for motels, food and automobile maintenance and repair be paid and that Ann Margaret Baumbach assist in the driving of said automobile during the trip; in accordance with said agreement the trip was commenced and each party performed her share of the agreement until the death of Ann Margaret Baumbach. (Clk. Tr. pp. 71-72)

Appellees contended that the accident was directly and proximately caused by the combined negligence of Ann Margaret Baumbach, deceased, and Edgar P. Gautreaux, driver of the 1964 Pontiac automobile, for the reason that the car in which Katherine Kumm was riding had been lying on its side in the lane in which Edgar P. Gautreaux's automobile approached, for a considerable time before it was struck by Edgar P. Gautreaux raising the issues of negligence and the application of the Doctrine of Last Clear Chance against appellant Edgar P. Gautreaux.

At the hearing upon appellees' motion for disposition of funds on deposit (Clk. Tr. p. 101), the Court stated to counsel the disposition he intended to make of the funds on deposit outlining the method he intended to use in view of the fact that the funds on deposit were insufficient to satisfy the two judgments.

Thereafter, the Court stated:

"The Court: I think the way I suggested is fair to everyone.

Mr. Lyle: *I am satisfied, your Honor.*" (Rep. Tr. [8-28-67] p. 9, l. 1 - p. 10, l. 14)

The Court proceeded then with the cooperation of counsel for appellants and appellees to compute in dollars and cents the amounts attributable to each party, the parties accepting, without objection, the amounts stated by appellants as their items of special damage in their "List of Exhibits to be offered by the defendants Gautreaux" (Clk. Tr. pp. 69-70), and accepting, without objection, the amounts stated by appellees on page 9 of their "Memorandum of Contentions of Fact and Law filed on behalf of defendants

Katherine Kumm and Mary J. Sweeney.” (Clk. Tr. p. 78)

The findings of fact and conclusions of law followed the detailed computation made by the Court with the assistance of both counsel in open court. (Rep. Tr. [8-28-67] p. 10, l. 15 - p. 27, l. 16)

ARGUMENT

I

Appellants Have Not Established Their Claim to the Fund.

The interpleader action filed by the Travelers Indemnity Company, whereby plaintiff paid into the registry of the court the sum of \$25,000.00 on behalf of the Estate of Ann Margaret Baumbach, deceased, requires that any claimant to the funds deposited into the registry of the court establish his or her right thereto by proving to the satisfaction of the court *the liability of the Estate of Ann Margaret Baumbach, deceased*. The complaint in interpleader was filed by plaintiff against “Bettie J. Brown, as Special Administratrix of the Estate of Ann Margaret Baumbach, deceased;”. (Clk. Tr. p. 2)

The action filed in the Superior Court of the State of California for the County of Los Angeles by Katherine Kumm and Mary J. Sweeney as plaintiffs, and the judgment obtained therein was against the defendant Bettie J. Brown, as Special Administratrix of the estate of Ann Margaret Baumbach, deceased.”

Bettie J. Brown was the Special Administratrix of the estate of Ann Margaret Baumbach, deceased, for

whose benefit the sum of \$25,000.00 was deposited into the registry of the United States District Court by the Travelers Indemnity Company, plaintiff herein.

It is recited in the verified answer and cross-complaint of appellees that "on the second day of July, 1965, cross-defendant Bettie J. Brown was appointed Special Administratrix with general powers of the Estate of Ann Margaret Baumbach, deceased, in an action now pending in the Superior Court of the State of California for the County of Los Angeles, being Number SO P 8643, and ever since said time said cross-defendant Bettie J. Brown has been and now is the duly appointed and acting Special Administratrix with general powers of the above referred to estate." (Clk. Tr. p. 8)

The cross-complaint further alleges that appellees have filed creditor's claims against said estate for the damage described in the cross-complaint, and that "said Special Administratrix with general powers has heretofore rejected said claims against said estate." (Clk. Tr. pp. 8-9)

Appellants have filed an action in the District Court of the State of New Mexico and received their judgment therein in which appellants as plaintiffs named "Katherine A. Kumm and *Mary J. Sweeney, administratrix of the estate of Ann Margaret Baumbach, deceased*" as the sole defendants.

The judgment recites that "the defendant Mary J. Sweeney is the administratrix of the estate of Ann Margaret Baumbach, duly appointed for such purposes by the Probate Court in the State of California,

that process herein has been duly served upon the defendants in full compliance with the terms of the New Mexico Non-Resident Motorists Statute, but notwithstanding such service of process these defendants have failed to appear and are in default, a certificate of default having been filed in this cause by the Clerk of this Court." (Clk. Tr. p. 98).

It is respectfully submitted that Mary J. Sweeney has never had any connection with the Estate of Ann Margaret Baumbach, deceased, nor has she acted either as Special Administratrix or as Administratrix thereof.

The *service* of the New Mexico summons and complaint on Mary J. Sweeney as well as the *default* entered against Mary J. Sweeney as Administratrix of the estate of Ann Margaret Baumbach, deceased, prevented the *estate* from *interposing a defense* to such action, and makes the New Mexico judgment a nullity as a claim against the estate of Ann Margaret Baumbach, deceased, in the *instant* action which would entitle appellants to distribution of the funds deposited in the registry of the United States District Court on behalf of Bettie J. Brown, as Special Administratrix with general powers of the estate of Ann Margaret Baumbach, deceased.

The estate of Ann Margaret Baumbach has never been served.

Appellees urge consideration of the following issues presented by this appeal:

- A. The New Mexico judgment shows on its face that the court did not obtain jurisdiction over the California estate or its administratrix.

1. An "estate" can neither sue nor be sued.
Lazar vs. Lazar Estate, 208 C.A. 2d 554;
Bright Estate vs. Western Airlines, 104 C.A.
2d 827.

A decedent's estate is not a person or entity,
and cannot be sued.

Vonchina vs. Turner Estate, 154 C.A. 2d 134.

2. Since all property of a decedent goes into
possession of the administrator, he is a *neces-*
sary party to all suits affecting it.

Harwood vs. Marye, 8 Cal. 580;

Hill vs. Westbrook, 95 C.A. 2d 599;

Miller & Lux vs. Katz, 10 C.A. 576;

Where a party is sued as administrator, the
complaint must allege the appointment of
an administrator, and that the party sued
was acting in that capacity, otherwise the
judgment would not be binding on the estate
of the intestate.

Barfield vs. Price, 40 Cal. 535;

Lyttle vs. Fickling, 72 C.A. 2d 383.

- B. The *estate* of Ann Margaret Baumbach, de-
ceased, did *not* submit itself to the jurisdiction
of the New Mexico Court under the provisions
of Sec. 21-3-16 of the *New Mexico Statutes*.

1. Sec. 21-3-16 of the *New Mexico Statutes* is
quoted verbatim in a footnote of Appellants'
Opening Brief at page 26. The section pro-
vides that a non-resident submits "*himself*
or *his personal representative*" to the juris-
diction of the New Mexico courts, if he oper-

ates a motor vehicle upon the highways of that state.

The administrator of an estate is the representative of the heirs and legatees of the decedent, and not the "personal representative" of the decedent.

An executor is the agent of the heirs and devisees, representing them as a trustee.

Bryan Estate, 99 C.A. 113;

Cole Estate, 124 C.A. 2d 615.

It is respectfully submitted that the administrator of an estate appointed in a foreign jurisdiction where the property of the decedent is located, does not submit himself to the jurisdiction of the New Mexico courts, either expressly under the applicable statute, or by implication.

- C. A plaintiff intending to file an action against the administrator of an estate must sue in the jurisdiction where the administrator was appointed by a court of competent jurisdiction, subject to the laws under which the administrator must act.

An administrator is subject to the jurisdiction and authority of the court which appointed him, and must account to the court for any matter affecting the administration of the estate and the assets thereof which he holds as an officer of the court and as a quasi-trustee for the heirs and devisees. *Both* the original complaint in interpleader and the New Mexico judgment recite

that probate proceedings are pending in the state of California.

It is respectfully submitted that any party intending to establish a claim against the estate of Ann Margaret Baumbach, deceased, must do so under the jurisdiction of the Superior Court of the State of California for the County of Los Angeles, and pursuant to the laws of the state of California applicable to claims against estates.

As such, a claimant must *plead* in his action that a claim was duly presented to the administratrix.

Rupp vs. Kahn, 246 C.A. 2d 188.

Probate Code Sec. 707.

If the claim is rejected, an action thereon *must* be filed within three months thereof, or it is forever barred.

Sec. 714 of the *Probate Code* reads in part as follows:

“When a claim is rejected by . . . the administrator . . ., written notice of such rejection shall be given by the . . . administrator to the holder of the claim, . . . and the holder of the claim . . . must bring suit in the proper court against the . . . administrator within three months after the date of service of such notice if the claim is then due . . . ; *otherwise the claim shall be forever barred.*”

- D. The jurisdiction of the court which rendered the judgment is open to inquiry and is subject to

collateral attack at any time, notwithstanding the full faith and credit clause of the federal constitution.

A judgment is entitled to full faith and credit only if rendered by a state court having jurisdiction of the parties and the subject matter. Where lack of jurisdiction is shown, the judgment will be denied enforcement.

Riley vs. New York Trust Co., 315 U.S. 343, 62 S.Ct. 608, 86 L.Ed. 885;

Williams vs. North Carolina, 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577.

If the court of a sister state is without jurisdiction over the person of the defendant, the judgment is of no force in California.

Commercial Factors vs. Kurtzman, 131 C.A. 2d 133;

Britton vs. Bryson, 216 Cal. 362;

Taylor vs. Taylor, 192 Cal. 71.

If lack of jurisdiction over a defendant is disclosed on the face of the judgment roll, a judgment against him is a nullity and is subject to collateral attack.

The Traub Co. vs. Coffee Break Service, Inc., 66 A.C. 377, 379.

As appears from the original complaint in interpleader filed against Bettie J. Brown as Special Administratrix of the Estate of Ann Margaret Baumbach, deceased, the New Mexico judgment is defective for each of the reasons hereinabove cited, and by reciting that the probate proceedings are pending in

the state of California, and by further reciting the wrong person as administratrix, the judgment shows a defect in service of summons and complaint, even if the Non-Resident Motorists Statute were to permit service upon the administratrix of an estate pending in California.

For the foregoing reasons, it is respectfully submitted that appellants have not established in the instant action any claim to the funds deposited herein.

II

Appellees Have Established Their Claim to the Fund.

As stated above, it is incumbent upon claimants under the Interpleader Act to establish a claim against the Estate of Ann Margaret Baumbach, deceased, in whose behalf the funds were deposited in the registry of the United States District Court.

After a claim, filed by appellees against the estate of Ann Margaret Baumbach in the probate action in the State of California, was rejected by the Special Administratrix with general powers, an action was filed by appellees in the Superior Court of the State of California for the County of Los Angeles resulting in a judgment *in personam* against the administratrix, in which, however, execution was limited to the funds on deposit in the United States District Court.

The action filed by appellees in the State of California against Bettie J. Brown as Special Administratrix involved as one of the issues the liability of one joint venturer against another joint venturer.

Specifically applicable to the issue whether a joint venturer is liable to another joint venturer in an action between them, New Mexico law and California law are identical in legal scope and conclusion.

The *New Mexico Guest Statute*, Section 64-24-1 of the New Mexico laws was held "unconstitutional" as applied to non-owner drivers.

In *Gallegos vs. Wallace*, (Supreme Court N. M. 1965) 398 Pac. 29, 982, the Court states at page 985 as follows:

"The legislature could have phrased the title in general terms so as to include non-owner drivers and such title would have been sufficient, but in this instance it was limited to *owners*. Under the rules by which we are governed in construing the constitutionality of such legislation the body of the act may contain only matter which is germane to the subject matter expressed in the title. We think a non-owner driver is clearly not germane to the subject matter expressly limited to the *owner* of the vehicle and that the statute, insofar as it limits the responsibility of non-owner drivers, contravenes the restriction of Sec. 16, Art. IV of the New Mexico Constitution."

In *Perini vs. Perini* (Supreme Court N. M. 1958) 324 Pac. 2d 779, three brothers decided to travel to Denver, Colorado, in a car belonging to one of them, and to share expenses.

At page 780, the Court states as follows:

"The court below found as a conclusion of law that the appellants were not within the meaning of the New Mexico Guest Statute, 1953 Comp.

Sec. 64-24-1, but were engaged in a joint venture for a family purpose. There is ample evidence to support this conclusion and to set it forth in this opinion would be profitless."

In *Harris vs. Harfmann*, 113 C.A. 2d 615, the court held that an agreement by a person that he will pay for the gasoline and oil consumed on a trip which he and an automobile owner contemplate taking in the owner's automobile makes such person a passenger, and the owner is liable for injuries resulting from a failure to exercise ordinary care while driving on the trip.

In that case plaintiff and defendant were sisters, and the accident happened in New Mexico.

In *Whitmore vs. French*, 37 Cal. 2d 744, the Court states the rule that where the driver of an automobile receives a tangible benefit, monetary or otherwise, which is a motivating influence for furnishing the transportation, the rider is a passenger and the driver is liable for ordinary negligence regardless of whether the trip is for the joint pleasure of the participants or is of a non-social nature.

All of the cases found refer to a *driver* and a *rider* without any reference to ownership.

The New Mexico statutes have no law providing for the vicarious liability of the owner.

In California the law is settled that an owner may sue a driver of his automobile for personal injuries due to negligence in spite of the provisions of Section 17150 of the *Vehicle Code*, which finds no counterpart in the *New Mexico statutes*.

In *Mason vs. Russell*, 158 C.A. 2d 391, an owner sued the driver of his own car for damages for personal injuries when the driver collided with the person of the owner pinning him against the side of a building.

From a judgment of dismissal, after the sustaining of a demurrer because of the provisions of Section 402 of the *Vehicle Code*, the Appellate Court reversed the judgment of dismissal and states at page 393 as follows:

“Necessarily, therefore, when the rights of third persons are not involved, such as in the present case where the action is by the owner against the permittee, an entirely different situation is presented, and hence the reason for the imputation of negligence ceases. In the case of *Ledgerwood vs. Ledgerwood*, 114 Cal. App. 538 (300 P. 144), a mother riding in a car which was the community property of herself and her husband and was then being driven by an adult son, sought damages for injuries as the result of his negligent operation of the car. In affirming the judgment in her favor the court held that “. . . where the injured party brings an action against the driver based upon the negligence of such driver, neither the fact that such injured party is the owner of the car, nor the fact that he is the employer or principal for whom the driver is acting, nor the fact that he is engaged in a joint enterprise with the driver, should defeat the action.” (P. 543)

The fact that the *Ledgerwood* case was decided prior to the addition of the particular phrase here in question is of no consequence in this proceeding. As the court noted in *Milgate vs.*

Wraith, 19 Cal. 2d 297, 300 (121 P.2d 10), the phrase, *shall be imputed to the owner for all purposes of civil damages*, ‘. . . can be interpreted in no other sense than to include actions by the owner against third persons. Indeed, that was undoubtedly the very purpose of the amendment. If the section were not so interpreted, the added portion would be meaningless . . .’ Again, in a somewhat similar situation the court stated in *Brown vs. Rowland*, 40 Cal. App. 2d Supp. 825, 827 (104 P.2d 138), ‘The obvious meaning of that section (402, subdivision [a]) is that the liability imposed on one who lends a car is for damage to the person or property of others. To say that he becomes liable for damages to himself would be absurd.’

The judgment is reversed.”

It is respectfully submitted that appellees have established a claim to the fund, i.e., *against the estate of Ann Margaret Baumbach, deceased*, in whose behalf the fund was established.

III

The Court Has Equitably Distributed the Funds Under the Jurisdiction and Upon the Authority of the Interpleader Act.

In its Pretrial Conference Order the Court rejected the contentions of the parties that it should try the claims of the parties *inter se* and dismissed the cross-complaints of appellants and appellees, requiring appellants and appellees to establish their right to the fund in the actions then pending in the courts of the State of California and New Mexico. (Clk. Tr. p. 86)

The precedents cited by appellants pertaining to the imputation of negligence of a joint venturer against a third party, fail to take into account that under the provisions of the Interpleader Act the claims of the parties *inter se* are not in issue, and the issue is confined to the establishment of a claim against the fund paid into the registry of the Court.

Appellants further fail to take into account that the New Mexico Statutes have no provision for the vicarious liability of the owner of an automobile.

In *Pan American Fire & Casualty Co. vs Revere*, 188 F.S. 474, the Court states the following conclusion pertaining to the issue now before this Court:

"In the event the aggregate of the verdicts should exceed the amount of Plaintiff's liability, the court reserves unto itself the task of apportioning the insurance proceeds in such manner as it deems just."

The purpose of the Interpleader Act was stated in *Consolidated Underwriters, etc. vs Bradshaw*, (U.S.D.C. Ark. 1955) 136 F.S. 395, involving an interpleader action by fire insurers against mortgagee and mortgagor, where the court states at page 397 as follows:

"Stated differently, an interpleader action normally proceeds in two phases. The first phase is the granting of the interpleader and the discharging of the plaintiff from further liability upon payment of the particular fund into the registry of the court. The second phase of an interpleader action is the determination of the claimants' rights to the fund. In regard to the second phase, each claimant occupies the position

of a plaintiff and must establish his claim by a preponderance of the evidence. See *Phoenix Mut. Life Ins. Co. of Hartford, Conn. vs. Reich*, D.C. Pa., 75 F. S. 886.

Again, there is a little doubt about the jurisdiction of the Court to determine the respective rights of the claimants to the fund in the registry of the Court, even though the claimants may be citizens of the same state. See *Callwood vs. Virgin Islands Nat. Bank*, 3 Cir., 221 F.2d 770, 779; *Old Colony Ins. Co. vs. Lampert*, D.C. N.J., 129 F. Supp. 545, 551; *Fidelity & Casualty Co. of New York vs. Wilson*, D.C. S.C., 105 F. Supp. 454, 457.

The real, and somewhat difficult, question of jurisdiction is whether the Court has the power to decide anything other than the rights of the claimants to the fund in the registry of the Court. In other words, the specific question is whether the Court has jurisdiction to enter a judgment or judgments in favor of one or more of the claimants against one or more of the opposing claimants, or whether the Court's jurisdiction is limited to the entry of a judgment merely distributing the fund in the registry of the Court to the claimant or claimants entitled thereto.

The Court is convinced that the latter statement is true, that is, *the jurisdiction of the Court is limited to the distribution of the fund, and that the Court has no power to enter separate judgments as between the claimants.*" (Emphasis added)

In *Preston Corp. vs. Raese* (D.C.W.Va. 1964) 236 F. S. 135, the Court states at page 144:

" . . . Likewise, in the state court, the right of Preston to prosecute and have jury trial of its

Cross-Claim for damages against Richard A. Raese, where personal service of process can be had on him, would seem to work to its advantage; whereas, whether such can be done in this court in an interpleader action is fraught with considerable uncertainty. *Liberty Oil Co. vs. Condon Nat. Bk.*, 260 U.S. 235, 244, 43 S. Ct. 118, 67 L.Ed. 232; *Bynum vs. Prudential Life Ins. Co.* (D.C.S.C.) 7 F. R. D. 585; 2 *Barron & Holtzoff*, Sec. 555, p. 138; *Liberty Nat. Life Ins. Co. vs. Brown*, 119 F. Supp. 920 (M.D. Ala. 1954). Indeed, in the recent case of *Metropolitan Life Ins. Co. vs. Enright* (S.D. Calif. 1964) 231 F. Supp. 275, it was held that there is no jurisdiction in interpleader to grant judgment in personam as to subject matter apart from that deposited in court, citing 48 C.J.S. Interpleader Sec. 47, p. 100, where the rule is stated:

‘The court ordinarily should decree the rights of the parties only with respect to the particular fund or property which is the subject matter of the litigation.’ ”

In *Atlantic Refining Co. vs. Continental Casualty Co.* (U.S.D.C. Penn.), 193 F. S. 478, the Court states at page 486:

“Interpleader does not affect the rights of the claimants or the rights of their respective claims *inter se*.”

It is respectfully submitted that the jurisdiction of this Court is controlled by the right of any particular claimant to the *fund*, and the action does not affect or involve the rights of particular claimants against each other or the merits of their respective claims against each other.

In *Metropolitan Life Ins. Co. vs. Enright*, 231 F.S. 275, decided by Judge Thurmond Clark in 1964 upon the issue whether the Court has a right to enter a judgment *in personam*, the court states, commencing at page 277 as follows:

“Counsel have cited no case — nor has the Court found authority — permitting a plaintiff thus to recover against a defendant in interpleader. The courts have in a number of cases held similar relief may not be granted as to a counterclaim.

In the case of *Lawyers Trust Co. vs. W. G. Maguire & Co.*, 2 F.R.D. 310 (D. DEL. 1942), the court specifically rejected the argument that as a court of equity it had power, in an action in the nature of interpleader, to grant complete relief to the parties. It pointed out, 2. F.R.D. at p. 313, the subject matter of a petition by one of the defendants was

“* * * not in any sense any part of the subject matter of litigation, of which the Court is in the course of disposing.’

The court in the case of *United States vs. Coumantaros*, 146 F. Supp. 51 (S.D.N.Y. 1956) dealt, at p. 53, with the question of jurisdiction over the person:

‘The movant * * * has also questioned the jurisdiction of the court over its person. The interpleader, at least in the first stage and probably in the second stage, is an action *in personam*. However, movant has not come into court *in limine* to contest the validity of the service of process upon it. * * * By the instant motion, it submitted itself to the jurisdiction of the court, claiming the fund and

demanding that plaintiff be directed to pay the fund to it. The court has acquired jurisdiction of the movant at least *to the extent that its rights to the fund can be judicially determined.*' (Emphasis added)

The following cases, analogous to the one at bar, hold there is no jurisdiction in interpleader to grant judgment *in personam* as to subject matter apart from that deposited in court: Stitzel-Weller Distillery vs. Norman, 39 F. Supp. 182 (W. D. Ky. 1941); Consolidated Underwriters of S.C. Ins. Co. vs Bradshaw, 136 F. Supp. 395 (W.D. Ark. 1955); Metropolitan Life Insurance Company vs. Chase, 294 F.2d 500 (3rd Cir. 1961). See also 48 C.J.S. Interpleader Sec. 47, p. 100, wherein it is stated:

'The court ordinarily should decree the rights of the parties only with respect to the particular fund or property which is the subject matter of this litigation.' "

The precedents seem to establish that (1) in an action filed under the Interpleader Act the claims of the parties *inter se* are not in issue, and (2) that in the event the aggregate of the judgments exceeds the amount deposited in the registry of the Court, the Court "reserves unto itself the task of apportioning the insurance proceeds in such manner as it deems just."

It is respectfully submitted that the court correctly interpreted the provisions of the Interpleader Act and distributed the funds equitably among the parties.

While appellants argue at length the negligence

of the deceased Ann Margaret Baumbach, they refuse to consider any concurrent negligence by the driver of the Gautreaux automobile. Appellants do agree that the division of the funds must proceed on equitable principles (App. Op. Br. p. 28), but they fail to point out where the allocation of any particular sum under the court's computation is inequitable.

The plan submitted by the court to counsel was endorsed by appellants. After the court stated how the funds should be allocated and advised counsel that "I think the way I suggested is fair to everyone," counsel for appellants stated "*I am satisfied, your Honor.*"

In their *Conclusion* in Appellants' Opening Brief, appellants state that "the District Court should be ordered to take evidence *concerning the conflicting claims of the parties and to apply the applicable principles of law thereto.*" (p. 41)

It is respectfully submitted that appellants' position is directly contrary to all of the holdings of courts who have interpreted the Interpleader Act, and appellants apparently are not so much concerned with whether the District Court applied equitable principles, but are instead attempting by this appeal to obtain a ruling by this Court that the District Court should litigate the claims of the parties *inter se*.

At the same time, however, they request a ruling by this Court that "the District Court should be instructed to prohibit any attempt to relitigate or collaterally attack the final judgment of the New Mexico court." (App. Op. Br., p. 41)

The suggestion by appellants presents an anomaly in the sense that the District Court would be required to accept a default judgment at face value and at the same time relitigate the allegations made in the complaint in *that* action which is the basis of that judgment. The result would not only be inequitable, but it would defeat appellants' position that the District Court must give full faith and credit to the New Mexico judgment.

CONCLUSION

Appellants have failed to establish by the New Mexico judgment their claim to the fund which requires as a prerequisite a judgment against Bettie J. Brown as Special Administratrix with general powers of the Estate of Ann Margaret Baumbach, deceased, for whose benefit the fund was established, and further requires the filing of a claim against the estate before the filing of the action. By failing to serve, even under the New Mexico Non-Resident Motorists Statute, the representative of the estate, the judgment is a nullity as far as the estate of Ann Margaret Baumbach is concerned in the instant action. The estate of Ann Margaret Baumbach, through its legal representative, had no opportunity to defend the New Mexico action for the reason that the estate was not served with a copy of the summons and complaint. Such result is true regardless whether the Court applies Section 21-3-16 of the *New Mexico Statutes*, cited by appellants on page 26 of their Opening Brief, or its California counterpart, Sections 17451-17452 of the California Vehicle Code.

If this Court should hold, however, that a claim against the estate of Ann Margaret Baumbach in the instant action has been established by appellants, it is respectfully submitted that, for the foregoing reasons and in accordance with the above cited authorities, the District Court equitably distributed the funds under the jurisdiction and authority of the Interpleader Act.

Respectfully submitted,

ERIC A. ROSE

Attorney for Appellees

CERTIFICATE

I certify that in connection with the preparation of this brief I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

ERIC A. ROSE

